

## Delta Aqueduct Protection Projects

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**Requested Action:** Staff recommends that the Council approve five proposed projects for full funding based upon specified findings, conditioned upon DWR making final CEQA determinations and funding decisions consistent with those findings, and including specified indemnification language in funding agreements. The total State funds allocated by the proposed Council action amounts to \$19,983,460. Local cost share funds will be in addition to this amount. The purpose of the Council's approval is to facilitate funding by DWR for local projects consistent with the criteria established by the Legislature in Water Code § 83002(a)(1).

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### **Background**

The Disaster Preparedness and Flood Prevention Bond Act of 2006 ( Senate Bill X2 1, Perata 2008), states *"not less than thirty-five million dollars (\$35,000,000) shall be expended by the department for projects to reinforce those sections of the levees that have the highest potential to suffer breaches or failure and cause harm to municipal and industrial water supply aqueducts that cross the Delta and which are vulnerable to flood damage, including the installation of scour protection on the supports of the aqueducts in those areas located adjacent to the sections of the levees that have been identified as having the highest risk for breaches or failure."* Water Code §83002(a)(1).

Water Code §83002(a)(1) also requires that *"Prior to the design or construction of any project funded pursuant to this paragraph, the California Bay-Delta Authority, or its successor, shall approve the specific project or program."* The Delta Reform Act of 2009 made the Council the successor to the California Bay-Delta Authority. The purpose of the Council's approval is to facilitate funding by DWR for local projects consistent with the criteria established in Water Code §83002(a)(1).

To meet statutory objectives, the California Department of Water Resources (DWR) issued a Proposal Solicitation Package (PSP) in early 2010. DWR identified 10 projects eligible to receive State funds. These projects protect islands upon which the East Bay Municipal Utility District's (EBMUD) Mokelumne Aqueduct traverses. The Delta islands involved are Woodward, Orwood, Palm, Upper and Lower Jones, and Lower Roberts.

At the May 2010 Delta Stewardship Council meeting, the Council approved the expenditure of funds for design, planning, and environmental review for the 10 projects, with the direction that project proponents could return to seek construction funding when CEQA compliance could be demonstrated. Five of the ten projects have completed their environmental assessments, scopes of work development, and

CEQA notice of exemption preparation and filing, and now seek Council . The remaining five projects will be submitted at a later date when final biological assessments are completed.

### **State and Local Cost Share Allocation**

The total amount of State funds allocated for all ten projects by the Legislature is \$35 Million, which represents 85 percent of the projects overall total cost. Thus, the 15 percent local cost share match will be approximately \$6.1 Million, for an overall total of approximately \$41.1 Million. At this point, only five projects are before the Council, requesting State funding in the amount of \$19,983,460, with the local cost share match in the amount of \$3,526,494. The Reclamation Districts (RDs) are not financially able to fund the local share, but the East Bay Municipal Utility District (whose water pipes cross several of the islands) will provide the local cost share matching funds.

### **Review**

To determine project adequacy, staff reviewed materials provided by the Reclamation Districts and by DWR staff, including the representations made therein, to determine:

1. **Appropriate project scope and description.** Council staff reviewed projects, as described in the submitted written information for technical accuracy. The projects as described appear to help further advance the goal of reducing Delta flood risk by repairing and strengthening levees and are consistent with statute.

**Adequate CEQA compliance.** The Council has discretionary approval authority with regard to these proposed projects, and as such, is a "responsible agency" under CEQA for each project. CEQA compliance is required prior to approval of a project, and commonly the **repair and maintenance** of Delta levees is eligible for exemption from CEQA requirements, if appropriate requirements are met. Applicable categorical exemptions are listed in Article 19 "Categorical Exemptions" of the CEQA Guidelines. As described in Section 15301, a Class 1 Categorical Exemption is applicable to operation, repair, maintenance, permitting, leasing, licensing or minor alteration of existing public or private structures, facilities, mechanical equipment or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination. Types of facilities to which this exemption applies are listed in several subsections, including the following: "(d) Restoration or rehabilitation of deteriorated or damaged structures, facilities, or mechanical equipment to meet current standards of public health and safety, unless it is determined that the damage was substantial and resulted from an environmental hazard such as earthquake, landslide or flood."

The materials reviewed by Council staff included:

1. Project Scopes of Work (Please see attachment 1)
2. Independent CEQA determination analyses from consultants hired by the Reclamation Districts
3. CEQA Notices of Exemption filed by the Reclamation Districts (Please see attachment 2)
4. DWR staff letters of CEQA categorical exemption, scope of work, and full funding eligibility concurrence (Please see attachments 3 and 4)

## **Projects**

### **1. Lower Jones Tract-RD 2038**

- a. Project Scope and Description: The project consists of adding fill to the levee crown and landside slopes, construction of landside seepage and stability toe berms, repair of slope protection and establishing stockpiles of quarry stone and aggregate base material for emergency response. Habitat enhancement sections include tree planting along the waterside of the levee above the ordinary high water mark.
- b. CEQA Compliance
  - i. Appropriate CEQA compliance documentation
    1. Baseline biological resources assessment-Moore biological Consultants
    2. Confirmation of CEQA determination-InSite Environmental, Inc.
    3. Resolution of CEQA exemption by RD 2038
    4. Notice of Exemption (NOE): Class 1 Categorical Exemption-filed 7/1/2011
  - ii. DWR concurrence: DWR is also a responsible agency under CEQA as it will provide funding for the proposed project. DWR staff has reviewed the proposed Scope of Work and conducted a site inspection, and concurs with the determination by RD 2038 that the proposed project is exempt from CEQA under the Class 1 Categorical Exemption for Existing Facilities (Article 19, Sec. 15301). Please see attachments 3 and 4.
- c. Staff Findings and Recommendations for Approval: Staff has reviewed the proposed project as described in documents provided by RD 2038 and by DWR staff, and based upon those documents and the representations made therein, recommends that the Council approve the project based on the following findings:
  - i. Staff concurs with the determinations by RD 2038 and DWR staff that the proposed project is exempt from CEQA under the Class 1 Categorical Exemption for Existing Facilities (Article 19, Sec. 15301).
  - ii. Staff concurs with DWR staff that the proposed project qualifies for full funding pursuant to water code §83002(a)(1).

- iii. **Approval by the Council should be conditioned upon a final CEQA determination and funding decision by DWR consistent with (i) and (ii) above.**

## **2. Lower Roberts Island-RD 684**

- a. Project Scope and Description: The project consists of adding fill to the levee crown and landside slopes, construction of landside seepage and stability toe berms, repair of slope protection and establishing stockpiles of quarry stone and aggregate base material for emergency response. Habitat enhancement sections include tree planting along the waterside of the levee above the ordinary high water mark.
- b. CEQA Compliance
  - i. Appropriate CEQA compliance documentation
    - 1. Baseline biological resources assessment-Moore biological Consultants
    - 2. Confirmation of CEQA determination-InSite Environmental, Inc.
    - 3. Resolution of CEQA exemption by RD 684
    - 4. Notice of Exemption (NOE): Class 1 Categorical Exemption-filed 7/1/2011
  - ii. DWR concurrence: DWR is also a responsible agency under CEQA as it will provide funding for the proposed project. DWR staff has reviewed the proposed Scope of Work and conducted a site inspection, and concurs with the determination by RD 684 that the proposed project is exempt from CEQA under the Class 1 Categorical Exemption for Existing Facilities (Article 19, Sec. 15301). Please see attachments 3 and 4.
- c. Staff Findings and Recommendations for Approval: Staff has reviewed the proposed project as described in documents provided by RD 684 and by DWR staff, and based upon those documents and the representations made therein, recommends that the Council approve the project based on the following findings:
  - i. Staff concurs with the determinations by RD 684 and DWR staff that the proposed project is exempt from CEQA under the Class 1 Categorical Exemption for Existing Facilities (Article 19, Sec. 15301).
  - ii. Staff concurs with DWR staff that the proposed project qualifies for full funding pursuant to water code §83002(a)(1).
  - iii. **Approval by the Council should be conditioned upon a final CEQA determination and funding decision by DWR consistent with (i) and (ii) above.**

## **3. Orwood and Palm Tract-RD 2024**

- a. Project Scope and Description: The project consists of adding fill to the levee crown and landside slopes, construction of landside seepage and stability toe berms, repair of slope protection and establishing stockpiles of

quarry stone and aggregate base material for emergency response. Habitat enhancement sections include tree planting along the waterside of the levee above the ordinary high water mark.

b. CEQA Compliance

i. Appropriate CEQA compliance documentation

1. Baseline biological resources assessment-Moore biological Consultants
2. Confirmation of CEQA determination-InSite Environmental, Inc.
3. Resolution of CEQA exemption by RD 2024
4. Notice of Exemption (NOE): Class 1 Categorical Exemption-filed 7/7/2011

ii. DWR concurrence: DWR is also a responsible agency under CEQA as it will provide funding for the proposed project. DWR staff has reviewed the proposed Scope of Work and conducted a site inspection, and concurs with the determination by RD 2024 that the proposed project is exempt from CEQA under the Class 1 Categorical Exemption for Existing Facilities (Article 19, Sec. 15301). Please see attachments 3 and 4.

c. Staff Findings and Recommendations for Approval: Staff has reviewed the proposed project as described in documents provided by RD 2024 and by DWR staff, and based upon those documents and the representations made therein, recommends that the Council approve the project based on the following findings:

- i. Staff concurs with the determinations by RD 2024 and DWR staff that the proposed project is exempt from CEQA under the Class 1 Categorical Exemption for Existing Facilities (Article 19, Sec. 15301).
- ii. Staff concurs with DWR staff that the proposed project qualifies for full funding pursuant to water code §83002(a)(1).
- iii. **Approval by the Council should be conditioned upon a final CEQA determination and funding decision by DWR consistent with (i) and (ii) above.**

**4. Upper Jones Tract-RD 2039**

- a. Project Scope and Description: The project consists of adding fill to the levee crown and landside slopes, construction of landside seepage and stability toe berms, repair of slope protection and establishing stockpiles of quarry stone and aggregate base material for emergency response. Habitat enhancement sections include tree planting along the waterside of the levee above the ordinary high water mark.

b. CEQA Compliance

i. Appropriate CEQA compliance documentation

1. Baseline biological resources assessment-Moore biological Consultants

2. Confirmation of CEQA determination-InSite Environmental, Inc.
3. Resolution of CEQA exemption by RD 2039
4. Notice of Exemption (NOE): Class 1 Categorical Exemption-filed 7/1/2011
- ii. DWR concurrence: DWR is also a responsible agency under CEQA as it will provide funding for the proposed project. DWR staff has reviewed the proposed Scope of Work and conducted a site inspection, and concurs with the determination by RD 2039 that the proposed project is exempt from CEQA under the Class 1 Categorical Exemption for Existing Facilities (Article 19, Sec. 15301). Please see attachments 3 and 4.
- c. Staff Findings and Recommendations for Approval: Staff has reviewed the proposed project as described in documents provided by RD 2039 and by DWR staff, and based upon those documents and the representations made therein, recommends that the Council approve the project based on the following findings:
  - i. Staff concurs with the determinations by RD 2039 and DWR staff that the proposed project is exempt from CEQA under the Class 1 Categorical Exemption for Existing Facilities (Article 19, Sec. 15301).
  - ii. Staff concurs with DWR staff that the proposed project qualifies for full funding pursuant to water code §83002(a)(1).
  - iii. **Approval by the Council should be conditioned upon a final CEQA determination and funding decision by DWR consistent with (i) and (ii) above.**

## 5. Woodward Island-RD 2072

- a. Project Scope and Description: The project consists of adding fill to the levee crown and landside slopes, construction of landside seepage and stability toe berms, repair of slope protection and establishing stockpiles of quarry stone and aggregate base material for emergency response. Habitat enhancement sections include tree planting along the waterside of the levee above the ordinary high water mark.
- b. CEQA Compliance
  - i. Appropriate CEQA compliance documentation
    1. Baseline biological resources assessment-Moore biological Consultants
    2. Confirmation of CEQA determination-InSite Environmental, Inc.
    3. Resolution of CEQA exemption by RD 2072
    4. Notice of Exemption (NOE): Class 1 Categorical Exemption-filed 7/1/2011
  - ii. DWR concurrence: DWR is also a responsible agency under CEQA as it will provide funding for the proposed project. DWR staff has reviewed the proposed Scope of Work and conducted a site

inspection, and concurs with the determination by RD 2072 that the proposed project is exempt from CEQA under the Class 1 Categorical Exemption for Existing Facilities (Article 19, Sec. 15301). Please see attachments 3 and 4.

- c. Staff Findings and Recommendations for Approval: Staff has reviewed the proposed project as described in documents provided by RD 2072 and by DWR staff, and based upon those documents and the representations made therein, recommends that the Council approve the project based on the following findings:
  - i. Staff concurs with the determinations by RD 2072 and DWR staff that the proposed project is exempt from CEQA under the Class 1 Categorical Exemption for Existing Facilities (Article 19, Sec. 15301).
  - ii. Staff concurs with DWR staff that the proposed project qualifies for full funding pursuant to water code §83002(a)(1).
  - iii. **Approval by the Council should be conditioned upon a final CEQA determination and funding decision by DWR consistent with (i) and (ii) above.**

### **Potential Liability Issues**

In 2003 a State appeals court held the State liable for failure of a levee generally operated and maintained by a local levee maintenance district, on the theory that the State incorporated the levee into the unified public flood control system. (Paterno v. State (2003) 113 Cal. App 4<sup>th</sup> 998, rev. denied 3/17/2004). The levees at issue here have not been incorporated into the flood control system – i.e. they are not “project levees”. However, Paterno-type liability and other theories of liability for flood damage are typically dependent on the facts of each case (“project” or “non-project levee”; cause of flood damages, responsibilities of relevant entities).

Staff has discussed the issue regarding potential liability associated with approving these projects, and based upon discussion and review of appropriate materials does not believe that approval of funding for these non-project levees would increase the State’s or the Council’s Paterno-type or other type of flood related liability. DWR provided sample language to the Council staff which would be included in funding agreements, requiring the reclamation districts to indemnify the State against any liability arising from these projects. Council staff recommends that the language be clarified to include indemnifying the Council’s “approval” of projects and to specify that the local agency will defend or pay the costs associated with defense of any related lawsuit (please see attachment 5, with additions underlined).

### **Staff Suggested Motion**

- A. Pursuant to Water Code Section 83002(a)(1), the Delta Stewardship Council approves for full funding by DWR the following five Delta Aqueduct Protection Projects:

1. Lower Jones Tract-RD 2038
2. Lower Roberts Island-RD 684
3. Orwood and Palm Tract-RD 2024
4. Upper Jones Tract-RD 2039
5. Woodward Island-RD 2072

Based upon findings, in concurrence with the Reclamation Districts and DWR staff, that:

- i. The projects are exempt from CEQA under the Class 1 Categorical Exemption; and
  - ii. The projects qualify for full funding pursuant to Water Code Section 83002(a)(1).
- B. The Council's approval is conditioned upon DWR making final CEQA determinations and funding decisions consistent with the findings listed in "A"
- C. The Council's approval is further conditioned upon DWR including the indemnification provision (with clarifying changes recommended by Council staff) in all funding agreements with the reclamation districts.

### **List of Attachments**

Attachment 1: Project Scopes of Work  
Attachment 2: CEQA Notices of Exemption  
Attachment 3: DWR Letters of CEQA Categorical Exemption and Scope of Work Concurrence  
Attachment 4: DWR Communication July 18, 2011  
Attachment 5: Sample Contract Indemnification Language

### **Contact**

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